IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 442 OF 2007

1. St. Joseph Church and ors. ..Petitioners

Vs.

1. Municipal Corporation of Gr. Mumbai and ors. ..Respondents

Mr. Milind Sathe, Senior Advocate with Mr. Birendra Saraf and Mr. Vivek Shiralkar i/by Shiralkar & Co. for petitioners.

Mr. K.K. Singhvi, Senior Advocate with Ms. Trupti Puranik i/by M/s. S.H. Ujjainwala & Co. for respondent nos. 1 and 2.

Mr. S.A. Ingawale, AGP for respondent nos. 3 to 5.

CORAM: B.H. MARLAPALLE &
S.R. SATHE,JJ.

Date : November 27 & 28, 2007.

ORAL JUDGMENT (Per B.H. Marlapalle,J.):

1. Heard Mr. Sathe the learned Senior Counsel with Mr. Birendra Saraf and Mr.Vivek Shiralkar i/by Shiralkar & Co. for petitioners, Mr. K.K. Singhvi the learned Senior Counsel with Ms. Trupti Puranik for the respondent nos.1 and 2. Mr.Ingawale, the learned AGP appears for respondent nos.3 to 5.

2. Rule. Respondents waive service. By consent of the parties, the petition has been heard finally forthwith.

3. In this petition filed under Article 226 of the Constitution, the petitioners prayed for a writ of mandamus to forthwith withdraw, cancel and/or delete the reservation of the petitioners' property bearing C.T.S. No. 856 and admeasuring about 626 sq.mtrs. at J.V.P.D. Scheme, Vile Parle (W), Mumbai and forthwith consider and sanction the plans for development of the said property. The petitioners further pray for directions to allow the petitioners to utilize the F.S.I. or T.D.R. of the portion of the said property admeasuring 550 sq.mtrs. which has already been physically taken over for D.P. road without carrying out any acquisition proceedings or alternatively forthwith pay compensation to the petitioner No.2 for the said portion of 550 sq.mtrs. at the prevailing market rate with interest as per the provisions of Land Acquisition Act, 1894.

4. The petitioner no.1 is a Public Charitable

Trust, registered under the provisions of the Bombay Public Trust Act, 1950 and petitioner no.2 is the sole trustee of petitioner no.1. Petitioner No.3 is a partnership firm, registered under the Indian Partnership Act, 1932 and petitioner no.4 is the partner of petitioner no.3. Respondent No.1 is the Municipal Corporation of Greater Mumbai and is a statutory Corporation constituted under the Mumbai Municipal Corporation Act, 1881 (the Act for short) and is a Planning Authority under the Maharashtra Regional and Town Planning Act, 1966 (for short the M.R.T.P. Act) for the areas falling within the municipal limits of Greater Mumbai. Respondent No.2 is the Municipal Commissioner of the respondent no.1-Corporation, respondent no.3 is a Land Acquisition Officer and respondent no.4 is the State of Maharashtra. As noted earlier, it is the case of the petitioner nos.1-Trust that it owned the property bearing CTS No. 856 admeasuring about 1176 sq.mtrs. and an area admeasuring about 550 sq.mtrs. was already acquired for road widening, leaving behind a plot area about 626 sq.mtrs. It was agreed to sell the said property to petitioner no.3 for a consideration of Rs.70,00,000/- which amount has

already been received by the petitioner no.1. Deed of Confirmation was singed on 18/11/2004 confirming the Agreement dated 7/10/1990 and the said Deed of Confirmation has been registered with the Sub Registrar of Assurance at Andheri.

5. The property in CTS No. 856 was reserved in the development plan for garden as per draft revised plan published by the Corporation on 30/4/1984 and despite the objections/suggestions, final notification dated 19/3/1993 was published in the Government Gazette sanctioning the development plan and the subject property was reserved for garden (626 sq.mtrs) and D.P. road 550 sq.mtrs. The petitioners further claim that since no steps were taken for acquiring the said remaining plot of 626 sq.mtrs. reserved for garden, petitioner no.1 issued a notice under Section 127 of the M.R.T.P. Act, 1966 on or about 31/3/2004 to respondent no.1 through the petitioner no.4 and thereby requesting the respondent-Corporation to take necessary steps to acquire the said property within six months from the date of notice, as is the requirement under the said section. A notification was published on 6/10/2004 in the Maharashtra

Government Gazette stating that the reservation of the garden in respect of the plot adjoining to petitioners' land was proposed to be deleted and was to be converted into reservation for parking plot. However, the State Government continued the reservation of the petitioners' property for garden. As no steps were taken within a period of six months from issuance of notice under Section 127 of the M.R.T.P. Act, as per the petitioners, the reservation stood deleted and, therefore, petitioner no.1 addressed a letter to the respondent - Corporation on 3/3/2005 pointing out that the reservation stood deleted and the land admeasuring 626 sq.mtrs. was converted into residential zone. The petitioner no.1 submitted their proposal for the development of the said property with a request to approve the plan. As per the petitioners, for the first time, it received a letter dated 16/3/2005 from the respondent no.1 informing that it had made an application to the Collector on 22/9/2004 to take appropriate steps for acquisition and this application was within the period of six months and, therefore, the plan submitted by the petitioners could not be processed. After some correspondence, the instant petition appears to have

been presented before this court. Initially, in the affidavit filed by the Director of Town Planning, in this petition, it was contended that the Collector, Mumbai Suburban District, vide his letter dated 29/5/2006, had stated that on the face of the preliminary enquiry carried out for land acquisition proposal it was noted from the Kami Jasti Patrak that CTS No. 856 corresponds to Survey No. 60A which was shown as a Government land and, therefore, there was no question of acquisition of the same and hence, the proposal for acquisition was returned by the Additional Collector, Mumbai Suburban District to the Municipal Corporation. The petitioners, therefore, made an application to the Superintendent of Land Records, who passed an order of rectification of Kami Jasti Patrak and the said order (operative portion) reads as under:-

> "1. The City Survey (Officer), Vile Parle should rectify the Statement of Increase and Decrease (Kami Jasti Patrak) in respect of S.No.52 and S. No.60A at Mouje Juhu. survey No. 52 as per the Enquiry Register should be given CTS No. 856 and its area should be

shown as 1176 sq.mtrs. and it be shown as Non-agricultrual land. As also the State of Increase and Decrease (Kami Jasti Patrak) pertaining to Survey No. 60A be rectified as per the Enquiry Register and be given CTS No.857 with an area 1609.2 sq.mtrs.

2. Concerned should be intimated in that regard."

6. On the basis of the above order of the Superintendent of Land Records, Mumbai, the City Survey Office has issued a fresh Kami Jasti Partak which clearly shows that CTS No. 856 corresponds with Survey No. 52 and not Survey No.60A as earlier claimed by the City Survey Office and the Collector. It is, thus, finally concluded that the petitioners' property i.e. CTS No. 856 corresponding to Survey No. 52 is not a Government property and the Government property is in CTS No. 857 corresponding to Survey No. 60A.

7. The main prayer before us in this petition is for a declaration that on the failure of the

respondent-Corporation and the Government authorities to take steps for acquisition as contemplated within the meaning of Section 126 with a period of 10 years and subsequently after issuance of notice under Section 127 of the M.R.T.P. Act, within a period of six months, the said reservation on CTS No.856 admeasuring 626 sq. mrts. has lapsed. It is further contended that on the lapsing of the reservation, the subject property gets released and the petitioners will be at liberty to develop the same for the same purpose for which the adjacent plot has been marked. The thrust of the arguments in support of this petition is based on a recent decision of the Supreme Court in the case of Girnar Traders vs. State of Maharashtra and ors. **[(2007) 7 SCC 555]**.

8. The respondent-Corporation has filed reply and we have heard the learned Senior Counsel. On 4/10/2007 the petition was argued at length and Mr.Singhvi the learned Senior Counsel appearing for the Corporation had submitted an oral application so as to grant time to the Corporation of about six weeks to approach the Apex Court to file a review petition. We had, therefore, granted six weeks time and when the

petition was taken up for orders on 22/11/2007 we were informed by Mr.Sathe the learned Senior Counsel that a Division Bench of this Court allowed Writ Petition No. 7512 of 2006 by its order dated 30/10/2007 by relying upon the said decision in Girnar Traders (Supra). Mr.Singhvi the learned Senior Counsel appearing for the Corporation made a submission that as per his instructions no further order has been passed on the review petition filed by the Corporation and, therefore, we proceed to decide this petition.

9. In Girnar Traders' case (Supra) two issues had been referred to the larger Bench, namely,

(a) Whether the reservations had lapsed due to the failure of the Planning Authority to take steps within the period of six months from the date of service of notice of purchase as stipulated under Section 127 of the M.R.T.P. Act?

(b) The question as regards applicability of new Section 11A of the Land Acquisition Act 1894 to the acquisition of

land under the M.R.T.P. Act.

. On the second question, the three Judge bench recorded a unanimous view to refer the issue to the larger Bench (Constitution Bench), whereas on the first issue the bench rendered a divided opinion. The minority view of Hon'ble Shri Justice P.K. Balasubramanyan (as His Lordship then was) concluded his opinion in para 123 as under:-

"123. I would, therefore, hold that there has been sufficient compliance with the requirement of Section 127 of the MRTP Act by the authority under the Act by the acquisition initiated against the appellant in the appeal arising out of SLP (C) No. 11446 of 2005 and the reservation in respect of the land involved therein does not lapse by the operation of Section 127 of the Act. But since on the main question in agreement with my learned Brothers I have referred the matter for decision by a Constitution Bench, I would not pass any final orders in this appeal merely based on my conclusion on the aspect

relating to Section 127 of the MRTP Act. The said question also would stand referred to the larger Bench."

. Whereas, the majority view of the remaining two learned Judges concluded the findings on the second issue in paras 66 to 68 in the following words:-

"66. On a minute and careful scrutiny of the documents produced before us, we do not find that the application under Clause (c) of Section 126(1) was moved by the officer authorised by the Municipal Corporation i.e. the Municipal Commissioner, to the State Government for acquisition of the land, so that it could be said that steps as contemplated were taken for the commencement of acquisition proceedings.

67. In view of our decision on the interpretation and applicability of Section 127 of the MRTP Act to the facts of the present case, the appellants are entitled to

the relief claimed, and the other question argued on the applicability of the newly inserted Section 11-A of the LA act to the acquisition of land made under the MRTP Act need not require to be considered by us in this case.

68. For the aforesaid reasons, the impugned judgment and order dated 18-3-2005 passed by the Division Bench of the Bombay High Court is set aside and this appeal is allowed. As no steps have been taken by the Municipal Corporation for acquisition of the land within the time period, there is deemed dereservation of the land in question and the appellants are permitted to utilise the land as permissible under Section 127 of the MRTP Act."

10. In Girnar Traders' case (Supra) it was an admitted position that on 16/9/1991 the revised development plan was sanctioned and 10 years had expired on 15/9/2001 without there being any acquisition or steps being taken for acquisition of

the land in question. On 15/3/2002, the purchase notice under Section 127 was given by the appellants which was received by the authorities on 19/3/2002. For the first time, after the service of purchase notice, on 9/9/2002 a proposal was made by the Improvement Committee recommending the Municipal Corporation for sanction to initiate the acquisition proceedings. On 13/9/2002 without there being any resolution by the Municipal Corporation, the Chief Engineer (Development Plan) sent an application to the State Government for initiating the acquisition proceedings. For the first time on 16/9/2002, a resolution was passed by the Municipal Corporation whereby sanction was given to initiate the acquisition proceedings of the land and the Municipal Commissioner was authorised to make an application to the State Government and on 17/9/2002 a letter was sent by the Chief Engineer (Development Plan) to the Secretary, Urban Development Department, Government of Maharashtra for initiating acquisition proceedings. Admittedly, the land was neither acquired nor were the steps taken within 10 years from the date on which the final regional plan or final development plan came into force.

. It would be appropriate to reproduce the provisions of Sections 126 and 127 of the M.R.T.P. Act, 1966:-

> "126.(1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority may, except as otherwise provided in section 113A acquire the land,-
>
> (a) by agreement by paying an amount agreed to, or
>
> (b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land Acquisition Act, 1894, Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or
>
> (c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894,

and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this sections or under the Land Acquisition Act, 1894, as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority.

(2) On receipt of such application, if the State Government is satisfied that the land specified in the application is needed for the public purpose therein specified or if the State Government (except in cases falling under section 49 and except as provided in section 113A) itself is of opinion that any land included in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in section 6 of the Land Acquisition Act, 1894, in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:

. Provided that, subject to the provisions of sub-section (4), no such declaration shall be made after the expiry of one year from the date of publication of the draft Regional Plan, Development Plan or any other Plan, or Scheme, as the case may be.

(3) On publication of a declaration under the said section 6, the Collector shall proceed to take order for the acquisition of the land under the said Act; and the provisions of that Act shall apply to the acquisition of the said land with the modification that the market value of the land shall be,-

(i) where the land is to be acquired for the purposes of a new town, the market value prevailing on the date of publication of the

notification constituting or declaring the Development Authority for such town;

(ii) where the land is acquired for the purposes of a Special Planning Authority, the market value prevailing on the date of publication of the notification of the area as an undeveloped area; and

(iii) in any other case the market value on the date of publication of the interim development plan, the draft development plan or the plan for the area or areas for comprehensive development, whichever is earlier, or as the case may be, the date or publication of the draft town planning scheme:

. Provided that, nothing in this sub-section shall affect the date for the purpose of determining the market value of land in respect of which proceeding for acquisition commenced before the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972:

. Provided further that, for the purpose of clause 9ii) of this sub-section, the market value in respect of land included in any undeveloped area notified under sub-section (1) of section 40 prior to the commencement of the Maharashtra Regional Town Planning (Second Amendment) Act, 1972, shall be the market value prevailing on the date of such commencement.

(4) Notwithstanding anything contained in the proviso to sub-section (2) and sub-section (3), if a declaration is not made within the period referred to in sub-section (2) (or having been made, the aforesaid period expired on the commencement of the Maharashtra Regional and Town Planning (Amendment) Act, 1993, the State Government may make a fresh declaration for acquiring the land under the Land Acquisition Act, 1894, in the manner provided by sub-sections (2) and (3) of this section, subject to the modification that the

market value of the land shall be the market value at the date of declaration in the Official Gazette made for acquiring the land afresh.

127. If any land reserved, allotted or designated for any purpose specified in any plan under this Act is not acquired by agreement within ten years from the date on which a final Regional plan, or final Development plan comes into force or if proceedings for the acquisition of such land under this Act or under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or as the case may be, Appropriate Authority to that effect; and if within six months from the date of the service of such notice, the land is not acquired or no steps as aforesaid are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed, and thereupon the land shall be deemed to be released from such reservation, allotment or designation and shall become available to the owner for the purpose of development as otherwise, permissible in the case of adjacent land under the relevant plan."

11. In paras 54 and 56 of Girnar judgment (Supra) the majority view has held that,

(a) a conjoint reading of Sections 126 and 127 of the MRTP Act makes the legislative intent clear to expeditiously acquire the land reserved under the Town Planning Scheme and,

therefore, various periods have been prescribed for acquisition of the owner's property;

(b) if the acquisition is left for time immemorial in the hands of the authority concerned by simply making an application to the State Government for acquiring such land under the LA Act, 1894, then the authority will simply move such an application and if no such notification is issued by the State Government for one year of the publication of the draft regional plan under Section 126(2) read with Section 6 of the LA Act, wait for the notification to be issued by the State Government by exercising suo motu power under sub-section 127 as regards lapsing of reservation and contemplated declaration of land being released and available for the land owner for his utilisation as permitted under Section 127;

(c) the steps towards commencement of the acquisition in such a situation would

necessarily be the steps for acquisition and not a step which may not result into acquisition and merely for the purpose of seeking time so that Section 127 does not come into operation.

(d) the legislature while enacting Section 127 has deliberately used the word "steps" (in plural and not in singular) which are required to be taken for acquisition of the land. On construction of Section 126 which provides for acquisition of the land under the MRTP Act, it is apparent that the steps for acquisition of the land would be issuance of the declaration under Section 6 of the LA Act. Clause (c) of Section 126(1) merely provides for a mode by which the State Government can be requested for the acquisition of the land under Section 6 of the LA Act. The making of an application to the State Government for acquisition of the land would not be a step for acquisition of the land under reservation. Sub-section (2) of Section 126 leaves it open to the State Government either to permit the acquisition or

not to permit, considering the public purpose for which the acquisition is sought for by the authorities. Thus, the steps towards acquisition would really commence when the State Government permits the acquisition and as a result thereof publishes the declaration under Section 6 of the LA Act.

12. We have gone through the order passed by the two different coordinate benches of this court i.e. in Writ Petition No. 7512 of 2006 between Shri Umesh Prabhudas Patel vs. The Commissioner, Nashik Municipal Corporation and ors. (unreported) as well as in the case of Satyabhamabai Bhimaji Dawkher vs. State of Maharashtra and ors. [2007 (6) Bom.C.R. 20]. As held in both these cases we are bound by the larger Bench decision in the case of Girnar Traders (Supra). In the instant case it is obvious that the Corporation did not take any further steps even after submitting application to the Collector on 22/9/2004 proposing the steps to be taken for acquisition of the petitoners' property and this was intimated to the petitioners first time vide letter dated 16/3/2005. Obviously the action of the Corporation as well as the

State Government, if any, in the instant case did not meet the requirements so as to hold that within a period of six months from service of the purchase notice under Section 127 of the M.R.T.P. Act, the respondents had taken steps to acquire the subject property within the meaning of the law laid down in the case of Girnar Traders (Supra) and this is not in dispute. The making of an application to the State Government through the Collector by the respondent - Municipal Corporation on or about 22/9/2004 for acquisition of the petitioners' remaining plot area (626 sq.mrts.) would not be a step for acquisition of the said land which is under reservation. In the rejoinder filed by the Corporation it has been stated that after the Superintendent of Land Records passed his order clarifying correct survey numbers, the Corporation has issued a letter dated 11/9/2007 in continuation with the earlier letter dated 22/9/2004 to the Additional Collector (Mumbbai Suburban District) for immediate acquisition of land under reference and declare the award under Section 11 of the Land Acquisition Act, 1894 so that the land under reference can be acquired and used for its intended public purpose. The steps towards acquisition are

commenced when the State Government permits the acquisition and as a result thereof publishes the declaration under Section 6 of the Land Acquisition Act, 1894, which is a step contemplated under Section 126(2) of the M.R.T.P. Act. Consequently, the reservation of the subject plot is deemed to have been lapsed and the petitioners would be entitled to utilise the said plot as permissible under Section 127 of the M.R.T.P. Act.

12A. So far as the next prayer for TDR/FSI in lieu of the part area admeasuring about 550 sq.mtrs. lost in the D.P. road development is concerned, the Corporation has not denied that the petitioner no.1 has already lost the said area and no acquisition proceedings as contemplated under the Land Acquisition Act, 1894 were initiated. On the face of this factual position, the Corporation does not dispute the entitlement of the petitioner no.1 to receive the compensation under the Land Acquisition Act, 1894 or in the alternate the FSI/TDR as per the Rules. It is, therefore, necessary that the Corporation considers processing the petitioner-trust's claim in this regard as well expeditiously and as per its Rules.

13. Hence, the petition succeeds. We hold that the petitioners' property under reservation (about 626 sq.mtrs.) forming part of CTS No. 856 (Survey No.52) at J.V.P.D. Scheme, Vile Parle (W), Mumbai is deemed to be released from the said reservation of garden. We, consequently, direct the respondent-Corporation to process the plan submitted for development of the said property for sanction as per the Rules and in keeping with the requirements of Section 127 of the M.R.T.P. Act. The prayer of the petitioners for FSI or TDR in respect of the area admeasuring 550 sq.mtrs. from CTS No.856 (Survey No.52) acquired for road widening shall be considered by the Corporation as per the Rules expeditiously.

. Rule is made absolute accordingly with no order as to costs.

. At this stage, Mr.Singhvi the learned Senior Counsel appearing for the Corporation submitted an oral application to stay the operation of this order for a period of eight weeks so as to enable the Corporation to approach the Apex Court. Mr. Sathe

the learned Senior Counsel appearing for the petitioners, on the other hand, has opposed the application. However, we deem it appropriate to grant stay and hence, the oral application is granted and the operation of our order is stayed for eight weeks from today so far as it relates to the Garden plot (626 sq.mtrs.).

. Certified copy be issued on priority basis.

(S.R. Sathe, J.) **(B.H. Marlapalle,J.)**